



DEPARTMENT OF ENERGY
Federal Energy Regulatory Commission

[Docket No. RM22-5-000]

Rate Recovery, Reporting, and Accounting Treatment of Industry Association Dues and Certain Civic, Political, and Related Expenses

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of inquiry.

SUMMARY: In this Notice of Inquiry, the Federal Energy Regulatory Commission (Commission) seeks comments on the rate recovery, reporting, and accounting treatment of industry association dues and certain civic, political, and related expenses. In addition, the Commission seeks comments on the ratemaking implications of potential accounting and reporting changes. The Commission also seeks comments on whether additional transparency or guidance is needed with respect to defining donations for charitable, social, or community welfare purposes.

DATES: Initial Comments are due [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], and Reply Comments are due [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Comments, identified by docket number, may be filed in the following ways. Electronic filing through <http://www.ferc.gov>, is preferred.

- Electronic Filing: Documents must be filed in acceptable native applications and print-to-PDF, but not in scanned or picture format.
- For those unable to file electronically, comments may be filed by USPS mail or by hand (including courier) delivery.

- Mail via U.S. Postal Service Only: Addressed to: Federal Energy
Regulatory Commission, Secretary of the Commission, 888 First Street,
NE, Washington, DC 20426.
- Hand (including courier) delivery: Deliver to: Federal Energy Regulatory
Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

The Comment Procedures Section of this document contains more detailed filing procedures.

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SUPPLEMENTARY INFORMATION:

1. In this Notice of Inquiry (NOI), the Federal Energy Regulatory Commission (Commission) seeks comments on the rate recovery, reporting, and accounting treatment of industry association dues and certain civic, political, and related expenses. In addition, the Commission seeks comment on the ratemaking implications of potential accounting and reporting changes. The Commission also seeks comments on whether additional transparency or guidance is needed with respect to defining donations for charitable, social, or community welfare purposes.

2. First, we seek comments on the delineation of recoverable and nonrecoverable industry association dues for rate purposes. Second, we seek comments on increased transparency in industry association expenses and segments of industry association dues charged to utilities, in addition to comments on utilities' and industry associations' expenses from civic, political, and related activities. Finally, we seek comments on a framework for guidance should the Commission determine action is necessary to further define the recoverability of industry association dues charged to utilities and/or utilities' expenses from civic, political, and related activities.

I. Background

3. The Commission has authority pursuant to the Federal Power Act (FPA) and the Natural Gas Act (NGA) to determine whether a rate is unjust, unreasonable, unduly discriminatory or preferential, and if the Commission determines that the rate is unlawful, to establish a just and reasonable replacement rate.¹ The Commission also has the authority to prescribe and maintain systems of accounts entitled "Uniform System of

¹ 16 U.S.C. 824e(a); 15 U.S.C. 717d(a).

Accounts” for public utilities and licensees subject to the provisions of the FPA, and natural gas companies under the NGA,² and the rules and regulations contained therein.³

4. The regulatory authority to modify rates, terms, and conditions rests with the Commission where any rate, charge, or classification, collected by any utility for any transmission, transportation, or sale subject to the Commission’s jurisdiction is unjust, unreasonable, unduly discriminatory or preferential.⁴ The USofA contains accounts to record the portions of industry association dues paid by utilities as either operating or nonoperating in nature.⁵ The USofA gives instructions on the separation of the expenses paid by utilities that industry associations incur and bill to utilities into the appropriate above the line (operating) and below the line (nonoperating) accounts.⁶ For example,

² 16 U.S.C. 825; 15 U.S.C. 717g; 18 CFR 101, 201 (2021).

³ “Utilities” is used hereinafter to refer to both public utilities as defined by FPA section 201(e) and natural gas companies as defined by NGA section 2(6). This NOI does not contemplate any changes to oil pipeline regulation under the Uniform System of Accounts (USofA), because the instructions for oil pipelines differ from those for utilities. The Uniform Systems of Accounts Prescribed for Oil Pipeline Companies Subject to the Provisions of the Interstate Commerce Act, 18 CFR 352 (2021), does not address industry association dues or civic and political expenses.

⁴ 16 U.S.C. 824e(a); 15 U.S.C. 717d(a).

⁵ 18 CFR 101, 201. Hereinafter, citations are made only to part 101 of the Commission’s regulations because they reflect the same provisions as part 201 for the accounts discussed herein. References to the USofA are to both part 101 and part 201 of the Commission’s regulations.

⁶ See *Delmarva Power & Light Co.*, 58 FERC ¶ 61,169, at 61,509 (1992) (The Commission “has allowed utilities to allocate [Edison Electric Institute (EEI)] contributions to wholesale customers only to the extent the contributions are for *research and development* programs to which wholesale customers themselves could not contribute. However, that portion of EEI contributions used for lobbying activities *may not, under any circumstances*, be included in the utility’s cost-of-service.”) (emphasis added). Typically, the “line” refers to the break between operating and nonoperating income and expenses on the Statements of Income for the year. For ratemaking purposes, the Commission has found that expenses above the line are usually chargeable to the ratepayer because they pertain solely to supplying a regulated utility service and are used

Account 930.2 (Miscellaneous and general expenses), which includes the cost of labor and expenses incurred in connection with the general management of the utility not provided for elsewhere in the USofA, is considered above the line (i.e., generally included in rate recovery) and covers industry association dues for company memberships.⁷ Account 426.4 (Expenditures for certain civic, political and related activities), which is used for costs for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation, or ordinances or for the purpose of influencing the decisions of public officials, is considered below the line (i.e., generally excluded from rate recovery).⁸

5. The Commission has not previously adopted a bright line rule or specific guidelines that delineate between above the line and below the line expenses for informing and influencing the public, including industry association dues for such activities, instead allowing utilities to determine the portion of their industry association dues to include in above the line and below the line accounts, respectively, based on information provided by the industry associations about their activities and associated costs. The Commission relies on the principle that the “intended use and the reason behind the payment[]” to inform and influence the public dictates its accounting assignment.⁹ Although the Commission applies this principle to the accounting treatment of utility expenditures, “where the line between public outreach and educational expenses

in determining rates. Expenses usually chargeable to the utility, rather than ratepayers, appear below the line.

⁷ 18 CFR 101, Account 930.2.

⁸ 18 CFR 101, Account 426.4.

⁹ *Alaskan Nw. Nat. Gas Transp. Co.*, 19 FERC ¶ 61,218, at 61,429 (1982).

and lobbying expenses is drawn has not been clearly delineated.”¹⁰ The Commission generally considers the appropriate delineation between above the line and below the line expenditures on a case-by-case basis given the facts presented.¹¹ The Commission’s case-by-case application of the “intended use” and “reason behind” tests on expenditures incurred by industry associations and borne by their utility members may have led to stakeholder confusion as to what expenses are properly recoverable in rates.¹²

6. The Commission presumes that expenses recorded in above the line, operating accounts may be recovered through rates, unless a showing is made that the expense is nonoperating in nature and the utility fails to rebut this showing. The Commission presumes that expenses recorded in below the line, nonoperating accounts may not be recovered in rates, without a further showing justifying such recovery for ratemaking purposes. Thus, if a utility records amounts in Account 930.2, those expenses are

¹⁰ *Potomac-Appalachian Transmission Highline, LLC*, Opinion No. 554, 158 FERC ¶ 61,050 (2017), *order on compliance*, 166 FERC ¶ 61,035 (2019), *order on reh’g*, Opinion 554-A, 170 FERC ¶ 61,050, at P 79 (2020) (*PATH*) (citing *ISO New England Inc.*, 117 FERC ¶ 61,070, at P 40 (2006) (*ISO New England*), *order on reh’g*, 118 FERC ¶ 61,105 (2007) (*ISO New England Rehearing*), *aff’d sub nom. Braintree Elec. Light Dep’t v. FERC*, 550 F.3d 6 (D.C. Cir. 2008)).

¹¹ *See, e.g., ISO New England*, 117 FERC ¶ 61,070 at P 47 (“On a number of occasions the Commission has found ‘lobbying’ expenses of any type to be non-recoverable, while on other occasions the Commission has determined that even if the costs are related to lobbying and should be recorded in Account 426.4, they are appropriately recoverable from ratepayers, upon sufficient showing that they were undertaken for the benefit of ratepayers.”).

¹² *See N. Border Pipeline Co.*, 23 FERC ¶ 61,213, at 61,439 (1983) (“the distinction between influencing public opinion and public relations activities lies in the intended use and reason behind these payments”); *see also PATH*, 170 FERC ¶ 61,050 at P 79 (citing *Potomac-Appalachian Transmission Highline, LLC*, 152 FERC ¶ 63,025, at PP 30, 40 (2015)).

presumptively recoverable, while costs recorded in Account 426.4 are presumptively nonrecoverable.

7. The Commission, as a part of its Office of Enforcement audit program, and if within the scope of an audit, evaluates whether a utility's classification of expenses between Accounts 930.2 and 426.4 complies with the USofA. Such audits of the classification of industry association costs between above the line and below the line accounts are limited to examination by the Commission of the recordkeeping and accounting of industry association dues by member utilities.¹³ Typically, the information available to audit staff lacks detailed descriptions of the industry association's activities for which members are charged. Also, a party to a utility's FPA section 205 rate case or NGA section 4 rate case may challenge the utility's accounting classification and/or recovery of expenses by protesting the utility's proposed rates. In addition, a complainant may file an FPA section 206 complaint or an NGA section 5 complaint alleging that the current rate treatment is unjust and unreasonable. For transmission formula rates and certain other formula rates, stakeholders also have the ability to file formal challenges before the Commission concerning utilities' implementation of their formula rates following review of annual updates.¹⁴

¹³ Unlike utilities, industry associations are not jurisdictional entities and thus are not subject to the Commission's accounting, record keeping, or reporting requirements. Moreover, industry associations are not subject to the Commission audits program.

¹⁴ See, e.g., *Pacific Gas & Elec. Co.*, 176 FERC ¶ 61,196, at P 15 (2021) (recognizing protest of the Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California). Utilities with formula rates are required to demonstrate that amounts are appropriately recorded through discovery (as part of an annual update information sharing process) and upon request.

8. In a typical rate proceeding, opposing parties bear the burden of raising an initial challenge of whether the company properly designated expenses between above the line and below the line accounts, or whether recovery of expenses appropriately booked to above the line accounts is reasonable.¹⁵ A challenge with reviewing the accounting of industry association dues—whether through the Commission’s Office of Enforcement audit program, or pursuant to a utility’s rate case, complaint proceedings, or formula rate challenges—is that utilities typically have not required their industry association to provide more than simple invoices and thus lack detailed information on the nature of the association’s activities for purposes of determining the appropriate classification of costs into above the line and below the line accounts.

9. On March 17, 2021, the Center for Biological Diversity filed a petition for rulemaking, requesting that the Commission amend USofA requirements relating to utility payments to industry associations engaged in lobbying or other influence-related expenses.¹⁶ The CBD Petition requested that the Commission amend the USofA to allocate all industry association dues paid by utilities to Account 426.4 which would highlight them for scrutiny, where “the utility, not the consumer, must bear the burden of proof to demonstrate an entitlement to recover expenses from ratepayers.”¹⁷ In response

¹⁵ See, e.g., *PATH*, 170 FERC ¶ 61,050 at PP 25–26 (noting that *PATH*, in an FPA section 205 filing, booked certain costs to an above the line account, but that certain participants subsequently argued that the costs should instead be booked to Account 426.4).

¹⁶ Center for Biological Diversity, Petition for Rulemaking to Amend the Uniform System of Accounts’ Treatment of Industry Association Dues, Docket No. RM21-15-000, at 1 (filed Mar. 17, 2021) (CBD Petition). The CBD Petition requested changes to the USofA for both public utilities and natural gas companies. See *id.* at 4 n.9.

¹⁷ *Id.* at 8 (quoting *Potomac-Appalachian Transmission Highline LLC*, 152 FERC ¶ 63,025 at P 29); *id.* at 16 (citing 16 U.S.C. § 824d(e)).

to the CBD Petition, some commenters recommended that the Commission remove all industry association dues from rates, whereas others suggested that such a move was unnecessary because industry association dues were properly allocated between recoverable and non-recoverable accounts and contrary to the fundamental principles of accounting.

II. Discussion

10. We find it appropriate to initiate this NOI to: (i) examine the Commission's current policies and regulations governing the rate recovery, reporting, and accounting treatment of industry association dues and certain civic, political, and related expenses; and (ii) identify potential changes that may be necessary to ensure that such expenditures are appropriately accounted for under the USofA and that recovery of these expenditures through Commission jurisdictional rates is just and reasonable. First, the NOI outlines the accounts utilities use to recover industry association dues. Second, we seek comments on the delineation of recoverable and nonrecoverable industry association dues for rate purposes. Third, we seek comments on increased transparency on industry association activities and expenses; comments on utilities' and industry associations' expenses from civic, political, and related activities; and what, if any, steps to increase transparency would assist the Commission in determining whether recovery of industry association dues in rates is just and reasonable.¹⁸ Finally, we seek comments on a framework for guidance should we determine action is necessary to further define the

¹⁸ Although the Commission has well-established precedent disallowing the cost recovery of donations for charitable, social, or community welfare purposes included in Account 426.1, we also seek comment on whether additional transparency or guidance is necessary to ensure such costs are appropriately treated for accounting and rate recovery purposes. *See, e.g., Ameren Ill. Co.*, 169 FERC ¶ 61,147, at P 81 (2019).

recoverability of industry association dues charged to utilities and/or utilities' expenses from civic, political, and related activities.

A. Cost Recovery and Current Accounting

11. As discussed above, utilities record industry association dues in two distinct accounts—Account 930.2 (Miscellaneous and general expenses) for above the line expenses and Account 426.4 (Expenditures for certain civic, political and related activities) for below the line expenses.¹⁹ Account 930.2 captures industry association dues that are operating in nature and therefore presumptively recoverable by utilities. The account states that “this account shall include the cost of labor and expenses incurred in connection with the general management of the utility not provided for elsewhere.”²⁰ The illustrative list of expenses included in Account 930.2 includes “industry association dues for company memberships.”²¹

12. Utilities may include certain portions of industry association dues in Account 426.4, even though the definition of Account 426.4 does not specifically reference industry association dues.²² This is because Account 426.4 is defined to include “miscellaneous expense items which are *nonoperating* in nature but which are properly

¹⁹ See *supra* notes 5, 7–8 and accompanying text.

²⁰ 18 CFR 101, Account 930.2.

²¹ *Id.*, Item 2.

²² See *Expenditures for Political Purposes — Amendment of Account 426, Other Income Deductions, Unif. Sys. of Accounts, and Report Forms Prescribed for Elec. Utils. and Licensees and Nat. Gas Cos. — FPC Forms Nos. 1 and 2*, Order No. 276, 30 FPC 1539 (1963).

deductible before determining total income before interest charges.”²³ Whereas a certain proportion of industry association dues may fall under the operating cost category for miscellaneous general expenses, the proportion of an industry association’s costs for nonoperating expenses is properly allocated to accounts in the Account 426 series.

Namely, Account 426.4 includes:

expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation, or ordinances (either with respect to the possible adoption of new referenda, legislation or ordinances or repeal or modification of existing referenda, legislation or ordinances) or approval, modification, or revocation of franchises; or for the purpose of influencing the decisions of public officials, but shall not include such expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility’s existing or proposed operations.²⁴

As described above, while recording costs in certain accounts provides useful information to regulators, it is not necessarily dispositive regarding recoverability.²⁵ The Commission employs the “intended use” and “reason behind” the payment standard to delineate costs incurred to inform or influence public opinion as either operating or nonoperating.²⁶

²³ 18 CFR 101, Special Instructions – Accounts 426.1, 426.2, 426.3, 426.4, and 426.5.

²⁴ 18 CFR 101, Account 426.4.

²⁵ *See supra* P 6.

²⁶ The Commission has found that

The distinction lies in the intended use and reason behind the payments. Expenditures incurred to influence the opinion of the public during the selection process have little or no *benefit to the ratepayers*, and therefore must be borne by stockholders. Just and reasonable expenditures incurred to keep the general public informed on the progress of the project and other public relations activities are proper

With regard to rate recovery, the Commission has required utilities to record costs for lobbying, civic engagement, public information campaigns, and the like to Account 426.4, except those costs that the utility demonstrates provide a benefit to ratepayers, thus determining whether the costs are recoverable or nonrecoverable.²⁷

13. Questions 1 through 5 seek information regarding how industry associations and their member utilities currently classify, record, and recover industry association costs, the nature of costs incurred, and dues assigned by industry associations. In particular, these questions seek to clarify which industry association costs member utilities currently book to Account 426.4 and which costs they book to Account 930.2. The responses to these questions may highlight cost categories that utilities include in rate recovery, which may, in turn, require further instruction from the Commission to ensure the proper rate treatment.

14. Questions 6 through 14 explore how much transparency for such costs exists and potential ways to improve this transparency. Due to the lack of transparency of industry association costs and the wide variety of activities and their specific contexts, the “intended use” and “reason behind” standard is difficult to apply to industry association dues and often requires case-by-case consideration.

15. Questions 15 to 20 below are intended to inform whether modifications to Commission regulations or additional guidance are needed to ensure the proper

expenses to be borne by ratepayers after operations commence.

Alaskan Nw. Nat. Gas Transp. Co., 19 FERC at 61,429 (emphasis added).

²⁷ See Order No. 276, 30 FPC at 1540; *Alaskan Nw. Nat. Gas Transp. Co.*, 19 FERC at 61,428.

classification of utility and industry association costs between Accounts 426.4 and 930.2. The Commission has noted that recording expenses in Account 426.4 “simply means that those costs are not presumed to be recoverable, shifting the burden on the filing entity to demonstrate why such costs should be recoverable.”²⁸ Further Commission instruction may reduce the frequency of rate proceedings that review industry association dues and help ensure that industry association dues are appropriately categorized for recovery purposes.

B. Industry Association Dues

16. We are considering whether to clarify the delineation of recoverable and nonrecoverable industry association dues for rate purposes.

Q1) The CBD Petition, in an example it argues is emblematic of practices among other industry associations, asserts that during the period when the EEI budget was subject to audits by the National Association of Regulatory Utility Commissioners (NARUC), “EEI was spending up to 50% of its income on advocacy and lobbying efforts.”²⁹ The Solar Energy Industries Association contends that in at least one instance, an investor owned utility’s EEI invoice noted only 7% of its membership

²⁸ *ISO New England Rehearing*, 118 FERC ¶ 61,105 at P 46.

²⁹ CBD Petition at 11 (citing Ex. A, David Anderson et al., *Paying for Utility Politics: How Utility Ratepayers are Forced to Fund the Edison Electric Institute and Other Political Organizations*, Energy and Policy Institute, at 6 (2017) (“One of the final audits from NARUC revealed that 50% of EEI’s expenditures went to the following categories: legislative advocacy; regulatory advocacy; advertising; marketing; public relations; legislative policy research; regulatory policy research.”)). NARUC ended its EEI budget audits over 10 years ago. *See id.*

dues related to influencing legislation. The investor-owned utility therefore recorded 93% of its EEI dues to Account 930.2.³⁰

- (a) For the three most recent fiscal years, what are the annual dues charged to individual utilities for their membership in each industry association for which utilities seek recovery in rates?
- (b) What percentage of industry association dues did industry association utility members classify and book as operating and nonoperating for the three most recent fiscal years?
- (c) What percentage of EEI dues did members classify as operating and nonoperating in the last three years subject to a NARUC audit? What are the reasons for any difference between these amounts and the percentages in question 1?

Q2) What methodologies do industry associations use to apportion industry association operating budgets into dues among member companies? To what extent are industry association expenses assigned and apportioned based on member classes or sectors and/or directly assigned to specific members, and if so, what are the bases for such assignment/apportionment and/or direct assignment?

³⁰ Solar Energy Industries Association, Comments in Support of Petition, Docket No. RM21-15-000, at 4–5 (filed Apr. 26, 2021). A copy of the 2006 invoice was attached to a pleading in Docket No. ER18-1122-001. Ameren Services Company, Motion for Leave to Answer and Answer, Docket No. ER18-1122-001, attach. EEI Invoice (filed Feb. 11, 2020).

- Q3) What internal controls and accounting methodologies are used by industry associations to track their costs generally and specifically to determine how costs are billed to members? In addition:
- (a) What cost categories are used in budgetary and accounting processes internal to industry associations to account for industry association dues? What were the budgets by cost category for the three most recent fiscal years?
 - (b) What processes do industry associations use to derive and inform utilities of their categorization of programs to allow the utilities to apportion their dues among various accounting classifications?
 - (c) How do industry associations derive and inform all jurisdictional companies of the portion of the total invoice payments associated with lobbying, public outreach on legislative and regulatory issues, and other categories of costs not recovered through rates?
 - (d) To what extent is information of any such methodologies or the underlying budgetary information shared with industry association members?
- Q4) To what extent do industry associations provide utilities with estimated itemized expenses in dues invoices? To what extent do the associations conduct reviews or other activities to determine and evaluate the actual level of cost incurred related to influencing legislation and lobbying expenses, and compare such actual levels to the estimated percentages of such activities provided to jurisdictional companies? What is the frequency and scope of such reviews or activities and how were the

results used? Please identify and explain any substantial impediments to, or industry association concerns with, providing utilities detailed information on the percentage of the association's charges attributable to civic, political, public outreach on legislative and regulatory issues, and similar activities.

- Q5) For industry associations, what is the nature of the activities and associated costs that fall into the following categories, and for each item, what percentage of the associated costs is classified as operating expense by the utility members:
- (a) Engineering or reliability standards development;
 - (b) Legislative affairs including: (i) political contributions; (ii) following legislative events and informing members; (iii) preparation and research in connection with correspondence with legislators, their staff, or legislative committees; and (iv) correspondence with legislators, their staff, or legislative committees;
 - (c) Financial support of other organizations (list organizations with corresponding contributions);
 - (d) Public information or outreach related to: (i) safety; (ii) promotion of utilities; (iii) existing or potential state or federal environmental regulations and/or laws; (iv) proceedings at FERC or before other administrative agencies; or (iv) other subjects (describe each element with corresponding expenditures);

- (e) Training for: (i) employee safety; (ii) accounting; (iv) planning; (v); reliability/resilience; (vi) market participation; and (vii) other (describe each element with corresponding expenditure);
- (f) Regulatory affairs including: (i) participation in regulatory proceedings including listing each proceeding and its primary issue(s); (ii) research conducted for regulatory proceedings; (iii) following regulatory proceedings; (iv) informing members of regulatory proceedings;
- (g) Meetings/conferences (to the extent not covered in the other categories listed here);
- (h) Administrative costs including rents and other overhead; and
- (i) Other (describe each element with corresponding expenditure).

C. Increased Transparency

17. We are considering whether increased transparency into industry association costs may improve public knowledge into industry association dues and therefore ensure the just and reasonable recovery of industry association dues.

- Q6) What mechanisms currently exist for stakeholders to examine the costs and activities of industry associations?
- Q7) Do industry associations disclose the nature of their costs and activities in any state regulatory proceedings? If yes, please provide citations.
- Q8) Have any industry associations been the subject of audits by any regulatory bodies? If yes, please provide a summary of the purpose and findings of the audit(s).

- Q9) What, if any, additional transparency is needed for stakeholders to evaluate the reasonableness of industry association costs that are recovered through rates?
- Q10) If additional transparency is needed for stakeholders, should any transparency requirements for industry association costs be limited to certain rates, such as electric transmission and natural gas transportation rates, in light of the potentially larger costs involved, or should they apply to all types of rates (e.g., power sales agreements, reactive power, and sale of electricity)?
- Q11) Specific to the electric industry, should any transparency requirements for industry association costs be limited to investor-owned utilities or should they also apply to municipal utilities and rural electric cooperatives who recover costs for Commission-jurisdictional service?
- Q12) Industry associations rely on certain cost categories to enable utilities to determine what portion of their industry association dues are properly recovered from ratepayers and what costs are borne by shareholders. Please describe any additional or alternative cost categories to those in Question 5, above, that industry associations or their members should disclose to provide sufficient transparency.
- Q13) What specific methods to enhance transparency of industry association costs should the Commission consider? For each of the following methods to enhance transparency, as well as others you may identify, please explain whether and how much would they (a) improve

transparency; (b) impose burdens on industry associations and/or their members; (c) help ensure that utility rates are just and reasonable:

- (a) utilities that seek to recover dues must possess detailed data that sufficiently explains such costs within their books and records, and such amounts must be subject to Commission audits, similar to that requested in Question 5, above;
- (b) limit a utility's ability to seek and obtain recovery of industry association dues to industry associations that publicly disclose detailed cost data, similar to that requested in Question 5, above; and/or
- (c) utilities must include in their FPA section 205 stated rate filings and their supporting workpapers to their formula rate annual updates, information similar to that requested in Question 5, above?

Q14) If the Commission imposed a requirement, such as one of those discussed in Question 13, above, should that requirement be limited to associations whose dues per utility exceed a certain minimum monetary threshold and, if so, what threshold?

18. We also seek comments on whether increased transparency into donations for charitable, social, or community welfare purposes is needed to improve public knowledge of such costs and therefore ensure just and reasonable treatment of donations or other charitable contributions.

Q15) What, if any, additional transparency is needed for stakeholders to evaluate whether donations for charitable, social, or community welfare purposes are treated appropriately for ratemaking purposes?

D. Guidance

19. We are considering whether the Commission should provide further guidance related to: (i) defining recoverable/nonrecoverable industry association costs for rate purposes; (ii) clarifying how certain “grey area” costs should be booked to accounts and treated in rates; and/or (iii) modifying Commission policies and instituting potential regulations with respect to costs that may currently be recoverable, but that the Commission may find should no longer be recovered.

Q16) Do utilities currently base the amount of their costs recoverable through rates on (i) the USofA, specifically the definitions in Accounts 930.2 and 426.4, (ii) the Internal Revenue Service (IRS) definition of lobbying, (iii) some other basis, or (iv) some combination thereof? What percentage of dues would be considered recoverable for each the four options for the most recent fiscal year?

Q17) What material differences, if any, are there between industry association costs considered nonoperating per the definition of Account 426.4 and industry association costs that may be deducted for tax purposes based on the Internal Revenue Code or IRS regulations? What are examples of such activities and expenditures?

Q18) For what, if any, industry association costs is the classification as operating or nonoperating through utility rates unclear and ambiguous? Please describe any such “gray areas.”

Q19) The Commission currently allows all costs related to regulatory interventions and litigation by both utilities and industry associations to be recorded to above the line accounts. Further, Account 426.4 provides as an exception to the political advocacy activities utilities are required to report in that below the line account, namely, “expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility’s existing or proposed operations.”³¹ What is the appropriate scope of this exemption for utilities and, by extension, their industry associations? Are there types of appearances before regulatory or governmental bodies for which the related expenditures should be excluded from rates, and if so, on what basis?

- Q20) Please provide examples as to what, if any, costs for
- (a) information campaigns carried out by industry associations are currently recoverable in utility member rates;
 - (b) information campaigns carried out by industry associations are currently recoverable in rates that the Commission should exclude from recovery in rates either by clarifying or revising its existing regulations;
 - (c) gifts, grants, donations, payments, dues, or contributions to other organizations by either utilities or industry associations are

³¹ 18 CFR 101, Account 426.4 (stating that this subaccount “shall not include . . . expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility’s existing or proposed operations.”).

currently recoverable and should not be recoverable in utility member rates; and

- (d) conferences or trainings are carried out by industry associations for which the Commission should prohibit from recovery in rates, and on what basis.

Q21) Please describe any other guidance that the Commission should provide with respect to the rate recovery of industry association dues or utilities' civic, political, and related expenses.

Q22) Please indicate whether there are any above the line, operating accounts other than Account 930.2 in which expenses related to civic, political, public outreach, and similar activities may be recorded (e.g., accounts pertaining to advertising costs) and, if so, what issues the Commission should consider with respect to those accounts.

III. Comment Procedures

20. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], and Reply Comments are due [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments must refer to Docket No. RM22-5-000, and must include the commenter's name, the organization they represent, if applicable, and their address in their comments. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as

described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

21. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's website at <http://www.ferc.gov>. The Commission accepts most standard word processing formats. Documents created electronically using word processing software must be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

22. Commenters that are not able to file comments electronically may file an original of their comment by USPS mail or by courier-or other delivery services. For submission sent via USPS only, filings should be mailed to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street, NE, Washington, DC 20426. Submission of filings other than by USPS should be delivered to: Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

IV. Document Availability

23. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (<http://www.ferc.gov>). At this time, the Commission has suspended access to the Commission's Public Reference Room due to the President's March 13, 2020 proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID-19).

24. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this

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By direction of the Commission. Commissioner Danly is dissenting with a separate statement to be issued at a later date.
Commissioner Christie is concurring with a separate statement attached.
Commissioner Phillips is not participating.

Issued: December 16, 2021.

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Rate Recovery, Reporting, and Accounting Treatment
of Industry Association Dues and Certain Civic,
Political, and Related Expenses

Docket No. RM22-5-000

(Issued December 16, 2021)

CHRISTIE, Commissioner, *concurring*:

1. I concur with today’s order instituting a Notice of Inquiry (NOI) related to the treatment of industry association dues and certain civic, political, and related expenses. The NOI asks a number of important questions regarding transparency and current accounting practices that will assist this Commission in ensuring that rates paid by consumers are just and reasonable. I write separately because I respectfully disagree with any suggestion that First Amendment rights are implicated, much less threatened, by this inquiry.

2. The Supreme Court of the United States has ruled that commercial speech by corporations and other business entities is protected by the First Amendment,¹ and that political speech by such entities is likewise protected.² It is also true that spending on protected speech is inextricably part of such speech and is thus protected as well.³

3. That said, the questions raised in this NOI are not related to whether a corporation or other business entity is allowed to spend money in the exercise of its First Amendment right to free speech or “to petition the government for a redress of grievances”⁴ (a/k/a “lobbying”). They can. Neither is it aimed at suppressing or burdening the protected speech of some limited subset of trade associations. Rather, the central question here is the same one present in so many of the cases before an economic regulator such as FERC, and that is the less headline-grabbing, albeit critically important, question: *Who pays?*

4. Relevant to the “who pays?” question is the type of business. A business in a competitive market has a First Amendment right to spend its own money on speech, including lobbying the legislators who pass laws that affect it. These activities may be aimed at rent-seeking through regulation or subsidies (or seeking protection from other special interests’ rent-seeking). James Madison made it clear in *The Federalist No. 10* that special interests (“factions”) would always seek to gain advantage at the expense of

¹ See *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996).

² See *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

³ *Id.*; see also *Buckley v. Valeo*, 424 U.S. 1 (1976).

⁴ U.S. Const. Adt. 1.

others through the political process; but it was also Madison who authored the First Amendment that protected the freedom of all to pursue their interests in the public arena, and left it up to (hopefully) *public*-spirited legislators —elected by the *public*—to protect the *public* interest from the special interests (including those claiming to represent the public interest) and their rent-seeking behavior.

5. Privately-owned businesses get funds from two primary sources: (i) investors who put up capital; and (ii) customers who purchase its goods and/or services. A company that holds a state-granted and state-protected monopoly franchise is fundamentally different, however, from a business in a competitive market, not in its First Amendment rights, but in how it can pay for certain activities. Unlike the business in a competitive market whose customers *voluntarily* choose to purchase its products over the products of its competitors, the state-protected monopoly gets its money from captive customers who have *no choice* but to purchase, for example, electrical power, a vital necessity of modern life, from the monopoly. The state-protected monopoly is also guaranteed recovery of its prudent costs incurred to serve the public (hence the term “public service company,” or “public service corporation,” defined terms typically applicable to public utilities under many state laws⁵). The question asked herein, therefore, is which of its costs should be charged to investors, who have voluntarily invested in the company, and which to captive customers, who have no choice but to purchase an essential product such as electricity from it.⁶

6. Nothing keeps the monopoly from spending money on First Amendment protected speech, including lobbying legislators and related public-relations activities, but its investors should pay those costs, *not* captive customers.⁷ That is the issue implicated by this NOI, which seeks to better understand whether costs permitted to be “above the line” (chargeable to customers) and those required to be “below the line” (chargeable to investors) for privately-owned companies are being treated as such on a transparent and consistent basis.

7. While in a typical rate proceeding, the opposing parties bear the initial burden of challenging the accounting or rate treatment of “above the line” or “below the line” expenses, under section 205 of the Federal Power Act, the ultimate burden has always been on the regulated public utility to demonstrate the justness and reasonableness of its proposed rate. Based on the record before us, and the Commission audit staff’s own experience, it may be that the Commission, customers, and other interested parties are not able to access the information necessary to determine whether the costs included in a jurisdictional utility’s rates are appropriately classified. The questions raised in the NOI relate to issues squarely within, and essential to, the Commission’s jurisdictional responsibilities to ensure just and reasonable rates.

⁵ See, e.g., Va. Code § 56-1 *et seq.*

⁶ This analysis applies to privately-owned companies, not publicly-owned or government-owned providers or co-operatives.

⁷ Legal fees are a more complicated matter.

8. Let me also emphasize: It may well be that the Commission's existing rules, regulations and precedent are sufficient to ensure the just and reasonable allocation of such costs, but it is worth reviewing. As always with energy regulation, the devil is in the details.

9. On a more specific topic, I also support asking whether it is time to clarify our regulations or further codify what is now established primarily through Commission precedent, *i.e.*, not allowing a monopoly to recover from customers the costs of its contributions and grants to charitable and civic organizations. Giving away other people's money is not altruism.

For these reasons, I respectfully concur.

Mark C. Christie
Commissioner

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